

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>AARON TURNER</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. 1,006,037
	)	
<b>CITY OF LAWRENCE</b>	)	
Self-Insured Respondent	)	

**ORDER**

Claimant requested review of the March 24, 2004 Award by Administrative Law Judge (ALJ) Brad Avery. On June 8, 2004 the Appeals Board (Board) placed this matter on the summary docket for disposition without oral argument.

**APPEARANCES**

Chris Miller, of Lawrence, Kansas, appeared for the claimant. Gerald Cooley, of Lawrence, Kansas, appeared for self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Claimant alleges he suffered an injury to the T9-10 area of his thoracic spine as a result of a series of accidents, while working as a trash truck driver for respondent from January 2, 2002 to March 16, 2002. The ALJ denied claimant's claim for compensation benefits after he concluded the "claimant has failed to prove that he suffered personal injury by accident which arose out of and occurred in the course of his employment with the respondent."<sup>1</sup> The ALJ found that claimant's ongoing complaints of rib pain were most likely due to scar tissue resulting from a non-work related knife wound many years earlier rather than from his work activities.

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<sup>1</sup>ALJ Award (Mar. 24, 2004) at 2.

The claimant appeals this determination and alleges that he has proven, “by a preponderance of the evidence, that he did suffer accidental injuries, arising out of and in the course of his employment, as alleged.”<sup>2</sup>

Respondent contends the ALJ's Award should be affirmed in all respects.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ succinctly and adequately summarized the testimony and medical opinions contained within the record and the Board will not unnecessarily repeat them. Highly summarized, claimant alleges he sustained an injury to his thoracic spine while working for respondent. The evidence bearing on the date of his accident, the mechanism of injury and the precise situs of the resulting pain or discomfort varies throughout the record.

At the Regular Hearing claimant testified that he began to have pain in his left rib area while repetitively opening a troublesome latch on a trash dumpster. He alleges this pain continued until sometime in March 2002, when he notified his employer and took a few days off to rest. Claimant told Dr. Edward J. Prostic, the physician he saw at his attorney's request, that he injured himself while raising a door in January 2002.<sup>3</sup>

After voicing his pain complaints, claimant was seen by his private physician who, in turn, referred him to a series of physicians in order to isolate the cause of claimant's ongoing complaints. These complaints are sometimes described as pain in the right rib area and at other times, abdominal pain.

Claimant ultimately had exploratory surgery of the abdomen on June 4, 2002, under the direction of Dr. Mark Praeger, who separated scar tissue from claimant's abdominal wall, removed two centimeter nodules in the small bowel as well as claimant's appendix.<sup>4</sup> Following surgery, claimant reported that his preoperative pain was gone and that he was feeling much better.

Three physicians testified in this case, however the only physician who causally relates the claimant's right rib pain to claimant's alleged work injury was Dr. Prostic. Dr. Prostic testified that while he cannot tell the age of the T9-10 disk protrusion, there are no

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<sup>2</sup> Claimant's Brief at 8 (filed May 7, 2004).

<sup>3</sup> Prostic Depo., Ex. 2 at 1.

<sup>4</sup> Praeger Depo. at 18, 20.

osteophytes and nothing in the appearance of the disk, as seen on the MRI, that makes him think the injury is anything other than relatively recent.<sup>5</sup> However, Dr. Prostic admits that he cannot say whether this disk protrusion was present for 5 days or 5 years.<sup>6</sup>

In contrast, Dr. Praeger, the surgeon who performed surgery, testified that he did not believe that any of the conditions he observed in claimant's abdomen were work-related. He further testified that the scar tissue which he separated was related to a stab wound suffered by claimant many years before.<sup>7</sup>

Claimant was also seen by Dr. Chris Fevurly, the respondent's occupational health doctor, on December 28, 2001, for purposes of evaluating claimant's ability to return to work. Dr. Fevurly saw claimant several times over the next month and noted claimant's abdominal complaints, which he attributed to constipation from the pain medications claimant had been taking for an earlier injury.<sup>8</sup>

When claimant's abdominal complaints did not resolve, Dr. Fevurly concluded they were not work related. He encouraged claimant to follow up with his private physician. Claimant had exploratory surgery and was thereafter evaluated by Dr. Prostic, and Dr. Fevurly was asked to review claimant's records. Dr. Fevurly did so and indicated there was no correlation between claimant's left sided chest complaints and the T9-10 disk protrusion. Rather, the changes in the thoracic spine are attributable to claimant's age.<sup>9</sup>

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions upon that right depends.<sup>10</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>11</sup>

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<sup>5</sup> Prostic Depo. at 18.

<sup>6</sup> Prostic Depo. at 18.

<sup>7</sup> Praeger Depo. at 22.

<sup>8</sup> As noted by the ALJ, claimant also injured his hip but that accident is not the subject of this claim.

<sup>9</sup> Fevurly Depo. at 36.

<sup>10</sup> K.S.A. 44-501(a)(Furse 2000); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

<sup>11</sup> K.S.A. 2001 Supp. 44-508(g); see also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

The ALJ obviously reviewed the evidence offered by the parties and concluded that “the most likely cause of his [claimant’s] discomfort was scar tissue from a nonwork related knife wound, which is the only trauma claimant reported to Dr. Praeger.”<sup>12</sup> The Board agrees with this conclusion and finds no reason to disturb the ALJ’s finding. Claimant’s rib pain and discomfort completely resolved following the surgery that addressed the restrictive scar tissue. The issue of the T9-10 disk protrusion did not appear until claimant was evaluated by Dr. Prostic. The claimant has failed to meet his burden of proof. The ALJ’s Award is hereby affirmed in all respects.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad Avery dated March 24, 2004, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Chris Miller, Attorney for Claimant  
Gerald Cooley, Attorney for Self-Insured Respondent  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director

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<sup>12</sup> ALJ Award (Mar. 24, 2004) at 2.